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In the Supreme Court of the United States

OCTOBER TERM, 1978

PAUL A. MAPES and JANE A. BRYSON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners, who are husband and wife, challenge the constitutionality of the income tax rates imposed upon married individuals on the ground that the taxes they paid as married persons filing joint returns exceeded the taxes that would have been due if they had been unmarried and filed separate returns. In this refund suit brought by petitioners in the Court of Claims, the court upheld the constitutionality of the difference in tax rates (Pet. App. 1a-23a).

1. The income tax is progressive and seeks to tax married couples with equal aggregate incomes equally. Given these two objectives, some disparities between the relative tax burdens of married persons and single persons are inevitable. In some cases, the tax will appear to penalize single persons; in other cases the tax will appear to penalize married persons. The best that can be attained is a reasonable compromise. In short, a "marriage-neutral" income tax is impossible. Bittker, *Federal*

Income Taxation and the Family, 27 Stan. L. Rev. 1389, 1395-1396 (1975). See *Hearings on Tax Treatment of Single Persons and Married Persons Where Both Spouses Are Working Before the House Comm. on Ways and Means*, 92d Cong., 2d Sess. 78-89 (1972).

The tax rates in Section 1 of the Internal Revenue Code of 1954, as amended (26 U.S.C.), are substantially the result of two major reforms that sought to minimize differences between the tax burdens borne by various groups of individuals. Prior to 1948, married couples in community property states were entitled to divide their incomes for tax purposes and thereby reduce their total tax liabilities, while couples in common law states were denied this privilege. Compare *Poe* v. *Seaborn*, 282 U.S. 101 (1930), with *Lucas* v. *Earl*, 281 U.S. 111 (1930). In order to correct the disparity of tax treatment between married couples in community property states and those in common law states, Congress in 1948 permitted income-splitting by means of the joint return. See H.R. Rep. No. 1274, 80th Cong., 2d Sess. 21-24 (1948); S. Rep. No. 1013, 80th Cong., 2d Sess. 22-25 (1948). Cf. *Fernandez* v. *Wiener*, 326 U.S. 340 (1945).

While the 1948 introduction of income-splitting benefited married persons, it was not accompanied by a reduction in the tax rates applicable to single persons. As a result, single persons thereafter paid as much as 40.9 percent more in taxes than did married couples with the same income. See S. Rep. No. 552, 91st Cong., 1st Sess. 260 (1969). Cf. *Faraco* v. *Commissioner*, 261 F. 2d 387 (4th Cir. 1958), cert. denied, 359 U.S. 925 (1959); *Kellems* v. *Commissioner*, 58 T.C. 556 (1972), aff'd per *curiam*, 474 F. 2d 1399 (2d Cir.), cert. denied, 414 U.S. 831 (1973).

In 1969, Congress sought to reduce the substantially higher tax burden on single persons.[1] It therefore amended Section 1 of the Code to provide that the taxes owing by a single person would never exceed by more than 20 percent the taxes that a married couple would pay on the same income. See S. Rep. No. 552, *supra*, at 260-262; Tax Reform Act of 1969, Section 803, 83 Stat. 678. These new rates, designed to lessen the disproportionate tax burden borne by unmarried individuals, served, in some instances, to increase the proportionate burden borne by certain married couples. Under these rates, when both husband and wife earn substantial income, their collective tax liabilities can exceed those of two unmarried individuals with equivalent incomes. This situation affects only about 20 percent of married couples. *House Hearings, supra*, at 75, 79. In general, therefore, the tax rates still favor married taxpayers.

The decision below correctly rejected petitioners' constitutional attack upon the disparity between the tax rates of married and single taxpayers. In so holding, it is in accord with a recent decision of the Seventh Circuit with respect to which the Court denied certiorari last term. See *Barter* v. *United States,* 550 F. 2d 1239, 1240 (7th Cir. 1977), cert. denied, 434 U.S. 1012 (1978). "No scheme of taxation, whether the tax is imposed on property, income, or purchases of goods and services, has yet been devised which is free of all discriminatory impact. In such a complex arena in which no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause." *San Antonio School District* v. *Rodriguez,* 411

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[1] In the Revenue Act of 1978 (H.R. 13511, 95th Cong., 2d Sess., Section 101 (1978)), Congress further adjusted the tax rates so as to reduce the tax burdens borne by certain married taxpayers. See generally S. Rep. No. 1263, 95th Cong., 2d Sess. 39-40 (1978).

U.S. 1, 41 (1973). Cf. *Madden* v. *Kentucky*, 309 U.S. 83 (1940); *Faraco* v. *Commissioner*, *supra*; *Kellems* v. *Commissioner*, *supra*.[2]

To be sure, the present tax system still contains some disparities. But given the inherent complexity of the problem, the taxing scheme Congress adopted in 1948 and refined in 1969, while not perfect, nevertheless satisfies the requirements of due process and equal protection. While petitioners object to the fact that, relative to single persons, married persons do not always fare as well, married persons do not have a constitutional right to most favored tax treatment. As the Seventh Circuit recently held in rejecting an identical challenge by a married taxpayer, "the inequities asserted to inhere in the 'marriage penalty,' whatever may be their persuasiveness as arguments for legislative change, do not rise to the level of constitutional violations * * *." *Barter* v. *United States*, *supra*, 550 F. 2d at 1240 (footnote omitted).[3]

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[2]The complexity of the problem here is illustrated by the solution proposed by petitioners. They urge (Pet. 17-18) that married taxpayers be taxed separately at the same rates applicable to single persons. But this approach would create as many problems as it would eliminate. For example, under the petitioners' scheme, married couples in which one spouse earned most of the income would be taxed at higher total rates than couples in which the spouses earned substantially equal amounts of income. See also *Jansen* v. *United States*, 441 F. Supp. 20 (D. Minn.), aff'd *per curiam*, 567 F. 2d 828 (8th Cir. 1977). There, the court rejected a single taxpayer's argument that the present rate schedules discriminated against single persons.

[3]Petitioners argue (Pet. 10) that their case is distinguishable from *Barter* on the ground that they entered into an antenuptial agreement in which they agreed to maintain a certain degree of financial independence from one another. But the Constitution does not bar Congress from establishing tax rates that apply to all married couples without regard to whether spouses are parties to an antenuptial agreement. As this Court noted in *Califano* v. *Jobst*, 434 U.S. 47, 55 (1977), "[t]he broad legislative classification must be judged by reference to characteristics typical of the affected classes rather than by focusing on selected, atypical examples." And, of course, a private contract cannot effectively amend an Act of Congress.

Nor does the tax law here intrude on the right of marriage or conflict with *Zablocki* v. *Redhail*, 434 U.S. 374 (1978). In *Zablocki*, the Court held that a statute which barred certain marriages could not withstand the "strict scrutiny" to which laws directly interfering with fundamental rights must by subjected. In so ruling, the Court specifically distinguished the case where the challenged statute places "no direct legal obstacle in the path of persons desiring to get married * * *" (*id.* at 387 n.12). Such laws are not subject to strict scrutiny but to normal standards of review even though they may "deter" or "burden" certain marriages. See *Califano* v. *Jobst*, *supra*, 434 U.S. at 54.

Contrary to petitioners' final argument (Pet. 18-19), the decision below does not conflict with *Hoeper* v. *Tax Commission*, 284 U.S. 206 (1931). In *Hoeper*, the Court held unconstitutional a Wisconsin law requiring a husband to report as his own the income of his wife over which he had no title or control. Here, however, the Section 1 tax rates that petitioners challenge do not require the attribution of income from one spouse to the other. The joint return for married persons is elective, not required (see Section 6013), and married persons are free to file separately.

While married persons filing separate returns will ordinarily pay more tax, in the aggregate, than if they filed jointly (see and compare Section 1(a) and (d) of the Code), each spouse still would be paying tax only on his or her separate income. Furthermore, if married persons filing separately could use the tax rates for single persons, or under any conceivable schedule pay less tax than if they filed jointly, then the tax liability of married couples would once again depend, as it did before 1948, on the amount of income attributable to each spouse. In that event, the 1948 principle of imposing the same tax on all equal-income married couples would be abandoned.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General

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